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No. 85-1765

In the Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF APPELLANT

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The Alliance of American Insurers, the American Insurance Association, and the National Association of Independent Insurers respectfully move for leave to file the brief amici curiae accompanying this motion. The consent of the attorney for appellant has been obtained and is being filed with the Court. The consent of the attorney for appellee was requested but refused.

The Alliance of American Insurers ("AAI") is a trade association of approximately 175 insurance companies writing property and casualty insurance throughout the United States.

AAI's member companies account for approximately 12 percent of the property and casualty insurance written in the United States.

The American Insurance Association ("AIA") is a national trade association of approximately 175 property and casualty insurance companies. AIA's member companies account for approximately 26 percent of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is a national trade association of more than 500 property and casualty insurance companies. NAII members write nearly 22 percent of the property and casualty insurance in force in the United States.

Amici are concerned that the pervasive and growing availability of punitive damages and the geometric increase in the size of punitive awards in recent years threatens the capacity of the insurance industry to provide liability insurance to the public at an affordable cost.*

A constitutional challenge to punitive damages was raised in the Mississippi Supreme Court and in appellant's jurisdictional statement in this Court. Appellant relies primarily on the Excessive Fines Clause of the Eighth Amendment. We believe this Court may wish to consider other equally significant constitutional problems. Accordingly, in our brief we argue: (1) Punitive damages in reality constitute a criminal penalty; accordingly, the defendant is entitled to the same constitutional safeguards as in a criminal proceeding. (2) At the very least due process requires proof by clear and convincing evidence. (3) Due process also requires a bifurcated trial and explicit standards governing the amount of a punitive award.

Before discussing these issues, however, we briefly describe the dimensions of the punitive damage problem, presenting the results of a recent RAND Corporation study and our own

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*Rightly so, the insurance industry has been called the banker of the tort system.

study of punitive damage jury verdicts for $100,000 or more rendered by California juries during the ten-year period from January 1, 1976, through December 31, 1985.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

See "Motion for Leave to File Brief, etc.," *supra.*

SUMMARY OF ARGUMENT

We briefly describe the dimensions of the punitive damage problem in terms of the rapidly growing number of punitive damage awards and the extraordinary increase in the size of these awards. Thereafter, we demonstrate: (1) Punitive damages in reality constitute a criminal penalty; accordingly, the defendant should be entitled to the same constitutional safeguards as in a criminal proceeding. (2) At the very least due process requires proof by clear and convincing evidence. (3) Due process also requires a bifurcated trial and explicit standards governing the amount of a punitive award.

ARGUMENT

I.

INTRODUCTION: THE DIMENSIONS OF THE PUNITIVE DAMAGE PROBLEM.

Punitive damages are an anomaly. They serve the same function as criminal penalties and are in effect private fines. *International Brotherhood of Electrical Workers v. Faust*, 442 U.S. 42, 48 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). Yet, unlike a criminal penalty, there usually is no statutorily-defined maximum[1] and many of the procedural protections afforded a criminal defendant are absent. In short, a civil defendant facing a punitive damage claim has much less to work with than if facing criminal prosecution, but frequently much more to lose—especially a corporate defendant like an insurance company.[2]

Until recent years the problems of inadequate procedural safeguards afforded a punitive damage defendant and the lack of meaningful standards to govern the amount of a punitive damage award have received less attention because "punitive damage awards occurred infrequently; their size, when they did occur, was relatively small; and, the cases in which they occurred involved, by and large, some of the most egregious

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[1]Recently, a few states have enacted statutory maximums for punitive awards. Colo. Rev. Stat. Ann. § 13-21-102 (Supp. 1986); Mont. Code Ann. § 27-1-221 (1986); Fla. Stat. Ann. § 768.73 (Supp. 1987); Okla. Stat. Ann. tit. 23, § 9 (1987). Only the Colorado ceiling is absolute; the others can be set aside under various circumstances.

[2]Since a corporate defendant cannot be imprisoned, the relevant comparison is to a monetary fine.

The majority of punitive damage awards are against businesses, not individuals. A recent RAND Corporation study of punitive damages, discussed *infra*, found that "[m]ost punitive damages awards in California were assessed against businesses, which constitute 57 percent of all defendants liable for punitive damages." Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings* viii (RAND Corp., Institute for Civil Justice, 1987) [hereinafter cited as RAND Study].

forms of intentional torts." 2 Ghiardi & Kircher, *Punitive Damages Law and Practice* § 21.01, at 1 (1985). Now, however, all this has changed. A punitive monster is growing on the civil side, and, unchecked by restraints on criminal penalties, it is reaching enormous proportions.

Appendix A lists the punitive damage jury verdicts for $100,000 or more rendered by California juries during the ten-year period from January 1, 1976, through December 31, 1985.[3] *The alarming trend in increased frequency and size of awards* will be obvious from even a quick perusal. The following chart summarizes the verdicts in these cases:

Year	No. $100,000+ Jury Verdicts	Sum of Verdicts
1976	7	$7,525,138
1977	9	$13,656,000
1978	14	$137,193,000[4]
1979	12	$35,415,815
1980	20	$35,116,500
1981	29	$27,375,710
1982	32	$54,861,096
1983	39	$109,405,254
1984	68	$59,342,317
1985	76	$362,494,739[5]

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[3]The source for the statistics is Jury Verdicts Weekly, Inc., *Jury Verdicts Weekly*, which compiles reports of jury verdicts in all California state and federal courts. *Jury Verdicts Weekly* does not purport to be a complete listing of every verdict in California, but it is recognized as an authoritative source of information concerning verdicts. The RAND Corporation used *Jury Verdicts Weekly* as the data base for its study of California punitive damage jury verdicts during the period 1980-1984. RAND Study at 4.

[4]One verdict, *Grimshaw v. Ford Motor Co.*, accounts for $125,000,000 of the total. Without *Grimshaw*, the total is $12,193,000. With *Grimshaw*, but using the amount accepted by the plaintiff pursuant to the trial court's remittitur ($3.5 million), the total is $15,693,000.

[5]One verdict, *Micro/Vest v. Computerland*, accounts for $125,000,000 of the total. Even without *Micro/Vest*, however, the

All told, during this ten-year period in California there were *109* punitive damage jury verdicts of *$1 million or more, 29* of them *$5 million or more, 16* of them *$10 million or more,* and *2* of them for *$125 million*! The verdicts rendered just during 1983, 1984 and 1985 account for 58 percent of all the $1 million-plus verdicts in the entire 10 years, 68 percent of the $5 million-plus verdicts, and 63 percent of the $10 million-plus verdicts. The year 1985 alone accounts for 25 percent of the $1 million-plus verdicts, 39 percent of the $5 million-plus verdicts, and 44 percent of the $10 million-plus verdicts.

The RAND Corporation's 1987 study of punitive damages[6] concluded two major changes have occurred in recent years. One, entirely consistent with the data we report above, is: "The largest punitive damage awards have increased greatly in size, sharply increasing both the average award and the total dollars awarded." RAND Study at ix. The other, based on RAND's analysis of punitive awards by type of case, is: "[P]unitive damages in business/contract cases have become far more significant: Both routine and extraordinary awards were larger and given more frequently." *Id.*

The business/contract category in the RAND study included bad faith claims against insurance companies, employers, and other businesses. *Id.*, at 8. The Study found:

> "In California, punitive damages for business/contract cases were led by awards in bad faith actions, which accounted for almost half of all dollars awarded as punitive damages in California between 1980 and 1984. Not only were growing numbers of

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total is still *$237,494,739.*

[6]The data for the RAND Study covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984, and all civil jury trials throughout California from 1980 to 1984. RAND Study at v.

damages awarded for bad faith, but those awards were much larger than in other business/contract cases." *Id.*, at vi.[7]

The actions of trial and appellate courts confirm that juries' punitive damage verdicts are frequently erroneous. Appendix B shows the results of the new trial motions in those cases included in Appendix A where the jury's punitive damage verdict was $1 million or more. In 104 of the 109 cases the trial court ruled on a new trial motion. A new trial was granted or the punitive award was remitted in 46 cases, or 44 percent of the time. Over 50 percent of the combined total amount awarded by these 104 juries was eliminated by the trial judges.[8] *The mere fact such a large percentage of punitive damages are remitted demonstrates current procedures are fundamentally flawed.*

Despite the frequency of remittitur, a great many seven-figure punitive damage awards have been affirmed on appeal.

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[7]The 109 cases listed in Appendix A where California juries awarded $1 million or more in punitive damages include the following awards in insurance bad faith cases:

$40,000,000	Fellows v. Allstate Ins. Co.
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.
13,054,479	Berk v. National Union Fire Ins. Co.
10,000,000	Stanton v. Continental Casualty Co.
8,500,000	Sykes v. Allstate Ins. Co.
8,000,000	Frazier v. Metropolitan Life Ins. Co.
7,163,340	Tidwell v. Republic Ins. Co.
7,000,000	Hronis v. Liberty Mutual Ins. Co.
5,300,000	Austero v. Washington National Ins. Co.
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.
5,000,000	Sprague v. Equifax, Inc.
5,000,000	Bertolani v. Equitable Life Assurance Society

Twenty-two more insurance bad faith cases had punitive awards between $1 million and $5 million.

[8]If the $125 million punitive damage verdict in *Micro/Vest v. Computerland,* where the new trial motion was denied, is excluded, the trial judges eliminated over 60 percent of the juries' combined total awards.

Just those against insurance companies include: *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520 (11th Cir. 1985) (Fla. law) ($2.1 million); *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir. 1983) (Ala. law) ($1.5 million); *Nationwide Mut. Ins. Co. v. Clay*, 469 So.2d 533 (Ala. 1985) ($1.25 million); *Hawkins v. Allstate Ins. Co.*, ___ *Ariz.* ___, ___ P.2d ___ (1987) ($3.5 million); *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987) ($5 million); *Sprague v. Equifax, Inc.*, 166 Cal.App.3d 1012, 213 Cal.Rptr. 69 (1985) ($1 million); *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984) ($3 million); *Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984) ($2.5 million); *Pistorius v. Prudential Ins. Co.*, 123 Cal.App.3d 541, 176 Cal.Rptr. 660 (1981) ($1 million); *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982) ($1.5 million).

To impose penal sanctions of this magnitude using the same procedural safeguards as in run-of-the-mill automobile negligence cases is wrong. This Court's willingness to consider the constitutional issues posed by punitive damages comes none too soon.

II.

PUNITIVE DAMAGES ARE SO PUNITIVE IN PURPOSE AND EFFECT AS TO CONSTITUTE A CRIMINAL PENALTY; ACCORDINGLY, THE DEFENDANT SHOULD BE ENTITLED TO THE SAME PROCEDURAL PROTECTIONS AND RESTRICTIONS AVAILABLE IN A CRIMINAL PROSECUTION.

A. A Sanction Which Is Penal In Purpose Or Effect Is Considered A Criminal Penalty.

The distinction between a civil penalty and a criminal penalty is constitutionally significant. *United States v. Ward*, 448 U.S. 242, 248, *reh'g denied*, 448 U.S. 916 (1980). When a state

sanctions a defendant "for the purpose of punishment" rather than as "an incident of some other legitimate governmental purpose," *Bell v. Wolfish*, 441 U.S. 520, 538 (1979), i.e., unless the penalty is a "remedial civil sanction," *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 366 (1984), due process requires the procedural protections and restrictions available in criminal prosecutions. *Ward*, 448 U.S. at 248-49; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). This is true even when the penalty takes the form of an economic sanction. *Ward*, 448 U.S. at 245-51. So long as it is designed primarily to punish, a fine or other economic sanction may not be imposed without according the defendant the procedural safeguards available in criminal cases. *Id.*, at 248-51.

Whether a penalty imposed by statute is criminal or civil (i.e., whether it is primarily designed to punish or to serve a remedial purpose) is a matter of both legislative intent and statutory purpose or effect. As explained in *Ward*, 448 U.S. at 248-49:

> "Our inquiry . . . [into whether a penalty is civil or criminal] has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [Citation.] Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was *so punitive either in purpose or effect* as to negate that intention. [Citation.] In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.' " (Emphasis added.)

Accord Allen v. Illinois, ___ U.S. ___, 106 S.Ct. 2988, 2992, 92 L.Ed.2d 296, 304 (1986); *One Assortment of 89 Firearms*, 465 U.S. at 362-63.

In Mississippi, punitive damages are a judicially-created doctrine; thus, it is the Mississippi Supreme Court's intention

to establish a civil or criminal penalty that is at issue. We are unaware of any case where that court has expressly stated punitive damages are civil rather than criminal in nature. At most, an intention to establish a civil penalty is implicit in its decisions. The key question, then, is whether punitive damages in Mississippi are "so punitive in purpose or effect" as to negate any such implied intention to establish a civil penalty.

B. Punitive Damages Are Penal In Purpose.

The Mississippi Supreme Court consistently has explained the purpose of punitive damages is to *punish* and *deter*. *E.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 268-69 (Miss. 1985) ("Punitive damages are in addition to actual damages, and are in the nature of punishment for the wrongdoing of the defendant, and to set an example so as to deter others from similar behavior. [Citation.] [¶] The basis in awarding such damages is to reward a plaintiff for public service in bringing the wrongdoer to account"); *State Farm Mut. Auto. Ins. Co. v. Daughdrill*, 474 So.2d 1048, 1052 (Miss. 1985) ("The purpose of punitive damages, as often stated by this Court, is to punish a tortfeasor"); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 (Miss. 1983) ("The accepted theory is that exemplary or punitive damages may be imposed as a punishment upon the wrongdoer, as a restraint on the transgressor. . . . What is otherwise a windfall is deemed necessarily granted to the plaintiff as his reward for public service in bringing the wrongdoer to account"); *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239, 247 (Miss. 1977); *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 151, 141 So.2d 226 (1962) ("We have said 'Punitive damages are punishing damages . . .' "); *Yazoo & Miss. Valley Railroad Co. v. Hardie*, 100 Miss. 132, 146, 55 So. 42 (1911) ("If the law considered only the individual no punitive damage would be allowed. . . . Such damage is allowed for the public good, and for the purpose of deterring others from like offenses"); *Bell v. Morrison*, 27 Miss. 68, 84 (1854); *accord City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by

definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); *Electrical Workers*, 442 U.S. at 48 ("Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence' "); *Gertz*, 418 U.S. at 350 (same); *Rosenbloom*, 403 U.S. at 82 (Marshall, J., dissenting) ("Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. . . . Thus they serve the same function as criminal penalties and are in effect private fines").

As this Court recognized in *Bell v. Wolfish*, 442 U.S. at 539 n.20: "Retribution and deterrence are *not* legitimate nonpunitive governmental objectives." (Emphasis added.) Accordingly, to borrow the Court's language in *Kennedy* (divestiture of citizenship for leaving the United States to avoid the military draft is punishment): "If the sanction . . . is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U.S. at 167.

C. Punitive Damages Are Penal In Effect.

Even if the punitive purpose of punitive damages were not so obvious, under *United States v. Ward* consideration must be given to punitive effect. In examining this issue we "refer to the seven considerations listed in Kennedy v Mendoza-Martinez. . . ." *Ward*, 448 U.S. at 249; *accord One Assortment of 89 Firearms*, 465 U.S. at 365. In *Kennedy*, 372 U.S. at 168-69, the Court set forth the following factors relevant to determining whether a sanction is penal or regulatory in effect:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether

> the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . ." (Footnotes omitted.)

We are aware these criteria are "neither exhaustive nor conclusive on the issue." *Ward*, 448 U.S. at 250. Nevertheless, as we now demonstrate, the *Kennedy* criteria strongly point to punitive damages in Mississippi being penal rather than merely remedial in effect.[9]

1. Punitive damages involve an affirmative disability or restraint.

In *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 518 F.2d 990, 1001 (5th Cir. 1975), *affd. on other grounds*, 430 U.S. 442 (1977), the Court of Appeals concluded this criterion gave "some weight" to the argument that a fine imposed for violating OSHA Safety Standards is a criminal penalty "because even though monetary penalties do not fit within the conventional definition of disability, i.e., want of legal capability, they do inflict a pocket-book deterrence or restraint on the recipient." (Footnote omitted.) Since punitive damages constitute " 'private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence,' " *Electrical Workers*, 442 U.S. at 48, they necessarily also constitute a "pocket-book deterrence or restraint" under this reasoning. When the growing number of punitive damage

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[9]In Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const.L.Q. 241 (1985), the seven *Kennedy* criteria are exhaustively analyzed in the context of punitive damages. The author concludes: "Punitive damages occupy a unique position in American jurisprudence, a punishment mechanism properly belonging to, but nevertheless evading, the criminal justice system." (*Id.*, at 241.) "When the punitive damages concept is analyzed . . . the conclusion is inescapable that they are penal in nature, spirit, and jurisprudence, and thus mandate higher standards of procedural protection." (*Id.*, at 247.) We commend Grass's analysis to this Court.

awards and the extraordinary increase in the size of these awards is considered, it is apparent that the impact of this particular form of pocket-book "restraint" is far more significant than that of any known fine.[10]

In addition to constituting a powerful monetary restraint, punitive damages impose a form of "disability" because of the associated stigma. As Professor Wheeler explains:

> "The word 'punitive,' denoting punishment for wrongdoing, is used to describe the award. Courts have stated that punitive damages awards represent the community's condemnation of 'reprehensible conduct' and express 'social condemnation and disapproval.' Thus, a punitive damages award, unlike a compensatory award, seems always to constitute a 'badge of disgrace' and to jeopardize the defendant's good name, reputation, honor, and integrity." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 282 (1983).

In Mississippi, "Punitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." *Bankers Life & Cas. Co.*, 483 So.2d at 269. " 'In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing *ruthless disregard for the rights of others*, so as to take the case out of the ordinary rule.' " *Veal*, 354 So.2d at 247 (emphasis added); *accord Fowler Butane Gas Co. v. Varner*, 244 Miss. at 150 ("injuries inflicted in the spirit of wanton disregard for the rights of others"). Certainly, there is stigma associated with a finding of "ruthless disregard for the rights of others."

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[10]The usual maximum fine permitted under Mississippi law for commission of a felony is $10,000. Miss. Code Ann. § 99-19-32 (Supp. 1986). For "offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed," the maximum fine is $1,000. Miss. Code Ann. § 99-19-31 (Supp. 1986).

Moreover, since our study of punitive damage jury verdicts for $100,000 or more during the ten years from 1976 through 1985 revealed almost all were against corporations or other businesses, Appendix A, and the RAND Study also found a majority of punitive damage awards are against businesses, not individuals, RAND Study at viii, the relevant comparison is to the stigma associated with criminal conviction of a corporation. In this context, the stigma associated with punitive damages is very similar to that associated with a criminal conviction.

> "[C]orporations, which have borne most of the burden of punitive damages in recent years, never face most of the nonmonetary costs of a criminal conviction. The government obviously cannot imprison a corporation. Corporations have few civil rights to lose; nor do they submit any job applications. Therefore, when convicted of a crime, a corporate defendant incurs [nonmonetary] costs that are quite similar to those it incurs when forced to pay punitive damages." Wheeler, *supra,* at 284.

In sum, the ever-increasing odds of a huge punitive award, the *staggering* sums being awarded, and the stigma associated with punitive damages all point to the conclusion that punitive damages involve an affirmative disability or restraint under the first *Kennedy* criterion.

2. Punitive damages historically have been regarded as punishment.

Punitive damages in Mississippi always have been regarded as punishment. In 1854 the Mississippi Supreme Court said:

> "It is settled by authorities almost without exception, in England and in the United States, that in actions for injuries to the person or to the character, the jury are not restricted, in giving damages, to the actual, positive injury sustained by the plaintiff, but may give damages *as a punishment against the defendant*; that not only may the plaintiff receive

> compensation for the injury inflicted upon him, but that the interest of society may be regarded, and such damages may be awarded as will tend to operate by way of example, and to deter others from similar acts of violence and oppression." *Bell v. Morrison,* 27 Miss. at 84 (emphasis added).

3. Punitive damages come into play only on a finding of scienter.

In Mississippi, " 'Punitive damages may be recovered for a *willful and intentional* wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong.' " *Veal,* 354 So.2d at 247 (emphasis added). Obviously, this mental state is even more culpable than scienter, which is merely acting with the intent to do the proscribed act without reference to its effect on others, *Atlas Roofing Co.,* 518 F.2d at 1001-02.

> "The inquiry [for punitive damages] concerns what level of reprehensibility the defendant achieves by his behavior. As with a criminal defendant, this question controls when and to what degree the defendant will be punished. . . . Requiring unity of act and intent to justify the infliction of punitive sanctions replicates criminal theory." Grass, *supra,* at 278.

4. Punitive damages promote the traditional aims of punishment.

As evidenced by the authorities cited above under our discussion of punitive purpose, punitive damages promote retribution and deterrence, the traditional aims of punishment. E.g., *Electrical Workers,* 442 U.S. at 48.

> "[U]nlike anything else in tort law, punitive damages are not assessed for injuries but are geared to the reprehensibility of the actor's behavior. No purer method of retribution and deterrence exists, with the exception of criminal law." Grass, *supra,* at 288.

5. Behavior resulting in punitive damages often is criminal as well.

The specific behavior about which appellee complains may not be a crime in Mississippi. *But see* Miss. Code Ann. § 83-5-33 (1972). In general, however, behavior resulting in punitive damage awards often is criminal as well. "Even where the behavior qualifying for punishment has not been classified as criminal conduct, punitive damages vindicate breaches of social duties that the defendant owes to the public as a whole." Grass, *supra,* at 293. Like criminal law, the focus of punitive damages in Mississippi is on the public interest. *E.g., Yazoo,* 100 Miss. at 146. Accordingly, the fifth criterion points in the direction of punitive damages constituting a criminal penalty.

6. Punitive damages serve no purpose other than punishment and deterrence.

As explained above, Mississippi law ascribes punishment and deterrence as the sole purpose of a punitive damage award. The Mississippi cases explain that the punitive award goes to the plaintiff as a "reward . . . for public service in bringing the wrongdoer to account." *Bankers Life & Cas. Co.,* 483 So.2d at 269. Awarding the punitive damages to the plaintiff as an incentive to sue is in furtherance of the retributive goal.[11]

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[11]In contrast, treble damages awarded to private individuals under the federal antitrust laws are considered a remedial civil sanction. *See Porter v. Household Finance Corp. of Columbus,* 385 F.Supp. 336, 341 (S.D. Ohio 1974), collecting cases. "Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury. '. . . Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing . . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, *and measures the awards by a multiple of the injury actually proved,* is designed primarily as a remedy.' " *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. ___, ___, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444, 460-61 (1985) (emphasis added); *accord American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 574-76 (1982); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 343-44 (1979).

7. Even assuming punitive damages served an alternate purpose (they do not), they would be excessive in relation to any such purpose.

The proliferation of huge punitive damage awards discloses a pattern of excess unrelated to any legitimate purpose. For example, in the present case a $1.6 million punitive award is far beyond anything justifiable when the actual injury is worth only $20,000.[12] As this Court put it in *Bell v. Wolfish* (restrictions and conditions accompanying pretrial detention are not punishment):

> "[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." 441 U.S. at 539 n.20.

In sum, punitive damages in Mississippi unquestionably are penal in both purpose and effect. When the civil law inflicts punishment through punitive damages it acts as the surrogate

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[12]If the objective of an award of punitive damages against an insurance carrier is really to regulate unfair claims practices and only incidentally to punish the carrier, one certainly would expect that the more serious the unfair claims practice the greater the award of punitive damages. Not so. Unlike treble damages in an antitrust case, which are a multiple of the actual damages awarded and thus small in sum where little harm is caused by the defendant's anticompetitive conduct and large where the harm is great, punitive damages against an insurer are awarded without regard to the actual harm caused by the insurer's conduct. Where the "unpleasant consequences," *Flemming v. Nestor*, 363 U.S. 603, 614, *reh'g denied*, 364 U.S. 854 (1960, are measured by the insurer's conduct and state of mind, not by the amount of harm the insurer caused, it is difficult to contend the primary focus is on "regulation of a present situation," *id.*, rather than punishment for past activity. Punitive effect is paramount and regulatory effect incidental.

of the criminal law. Accordingly, a defendant facing punitive damages should be entitled to the same constitutional safeguards as a defendant in a criminal proceeding, including proof beyond a reasonable doubt,[13] protection against double jeopardy,[14] the privilege against self-incrimination,[15] and a unanimous verdict by six-person juries and a majority of ten for twelve-person juries.[16]

III.

ASSUMING *ARGUENDO* THAT PUNITIVE DAMAGES ARE NOT SO PUNITIVE IN PURPOSE OR EFFECT AS TO CONSTITUTE A CRIMINAL PENALTY (THEY CLEARLY ARE), DUE PROCESS REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE.

A. This Court Has Used The Three Factors In *Mathews v. Eldridge* To Determine If Due Process Requires Proof By Clear And Convincing Evidence.

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property . . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

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[13]*In re Winship*, 397 U.S. 358, 364 (1970).

[14]United States Constitution, 5th Amendment. Protecting punitive damage defendants against double jeopardy is particularly significant "in products liability and other mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation." Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va.L.Rev. 139, 139 (1986). *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Ford.L.Rev. 37 (1983).

[15]United States Constitution, 5th Amendment.

[16]*Burch v. Louisiana*, 441 U.S. 130, 136 (1979). Mississippi requires a unanimous twelve-person jury in criminal cases. *Markham v. State*, 209 Miss. 135, 46 So.2d 88 (1950).

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

These *Eldridge* factors have been used by this Court to determine whether due process requires proof by clear and convincing evidence in particular circumstances. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held clear and convincing evidence is required to extinguish the parent-child relationship, and in *Addington v. Texas*, 441 U.S. 418 (1979), the Court held clear and convincing evidence is required to involuntarily commit a person to a mental hospital.[17]

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[17]Other cases where the Court has held the "clear and convincing" standard or one of its variants is the appropriate standard of proof are *Colorado v. New Mexico*, 467 U.S. 310, 315-16 (1984) (water rights disputes between states); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and *Gertz*, 418 U.S. at 350 (defamation actions brought by (1) public officials; (2) public figures; and (3) private individuals seeking presumed or punitive damages where defamatory statements involve matters of public concern); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 285-86 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 159 (1943) (denaturalization). In *Vance v. Terrazas*, 444 U.S. 252, 266-67 (1980), the Court said its deportation and denaturalization decisions were not constitutionally-compelled.

B. Under The *Eldridge* Test, Clear And Convincing Evidence Is Required To Prove Entitlement To Punitive Damages.[18]

1. The private interests affected by punitive damage awards — the enormous economic impact of such awards and the associated stigma — are commanding.

We described these interests in our discussion of the seven *Kennedy* criteria and will not repeat that discussion here. The important point is this: Our contention that due process requires the "clear and convincing" standard of proof cannot be discounted merely because one of the interests at stake is monetary. The monetary interest when a defendant, especially a corporate defendant, faces a claim for punitive damages is *wholly different from any other monetary interest known to law.* The ever-increasing odds in favor of a punitive award and the staggering sums being awarded mandate a higher burden of proof than that used for run-of-the-mill automobile negligence actions.[19]

The importance of the stigma factor was acknowledged in *Addington v. Texas*:

> "One typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the

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[18]Wheeler, *supra*, thoroughly discusses the *Eldridge* test in the context of punitive damages and concludes: "[P]unitive damages defendants are entitled to . . . proof by clear and convincing evidence as to the substantive basis for a punitive damages award . . . ." (*Id.*, at 351.) As with Grass's analysis of the seven *Kennedy* criteria, we commend Professor Wheeler's article to this Court.

[19]For this reason, language in *Santosky*, quoting *Addington*, downplaying the significance of the monetary interest at stake in a typical "civil dispute over money damages," 455 U.S. at 755, should not be controlling.

> risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." 441 U.S. at 424.

In *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 457-58 (1980), the Wisconsin Supreme Court held that entitlement to punitive damages must be proved by clear and convincing evidence because of the stigma factor.

In short, the interests affected by punitive damages are "sufficiently grave to warrant more than average certainty on the part of the factfinder," *Santosky*, 455 U.S. at 758.

2. The risk the jury will erroneously deprive the defendant of its property and good name is extremely high and greatly outweighs the risk to the plaintiff of an erroneous denial of punitive damages.

In *Santosky*, the Court discussed the factors which "combine to magnify the risk of erroneous factfinding [in a parental neglect proceeding]." 455 U.S. at 762. At least two of these factors are directly relevant to punitive damages.

First, the *Santosky* court noted that "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." 455 U.S. at 762. Similarly, as we explain in detail in the next section of this brief, the standard for determining the amount of a punitive damage award is vague—so vague, in fact, as to be unconstitutional. The standard used in Mississippi is: "that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant." *Bankers Life & Casualty Co.*, 483 So.2d at 278. Jurors considering this vague standard cannot possibly avoid decisions based on subjective values. *See City of Newport*, 453 U.S. at 270 ("The Court has remarked elsewhere on the broad discretion traditionally accorded to juries in assessing the amount of

punitive damages"); *Electrical Workers,* 442 U.S. at 50 ("Because juries are accorded broad discretion both as to the imposition and amount of punitive damages [citations], the impact of these windfall recoveries is unpredictable and potentially substantial"); *Gertz,* 418 U.S. at 350.

Moreover, and most significantly, "*jurors imposing discretionary punitive damages have no statutorily specified maximum* that limits the extent to which they may err in setting penalties." Wheeler, *supra,* at 286 (emphasis added); *see Rosenbloom,* 403 U.S. at 82-83 (Marshall, J. dissenting) ("Unlike criminal penalties . . . punitive damages are not awarded within discernible limits, but can be awarded in almost any amount. . . . The manner in which unlimited discretion may be exercised is plainly unpredictable").

Second, the *Santosky* court observed that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups [citation], such proceedings are often vulnerable to judgments based on cultural or class bias." 455 U.S. at 763. Similarly, the inherent prejudices many jurors have against large and wealthy corporate defendants, particularly insurance companies, cannot be gainsaid. *See* Morris, *Punitive Damages in Tort Cases,* 44 Harv.L.Rev. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare"); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U.Chi.L.Rev. 1, 11 (1982) ("many persons are hostile toward major institutions in general and 'big business' in particular"); Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 So.Cal.L.Rev. 1, 42-43, 52-53 (1982) ("the biases and inclinations toward wealth redistribution exhibited by triers of fact are permitted to influence decisions on punitive damage issues. Accordingly, there is little reason to believe that only deserving defendants are punished" (at 53)); *City of Newport,* 453 U.S. at 270. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *Electrical Workers,* 442 U.S. at 50 n.14; *see Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J.,

dissenting) ("punitive damages are frequently based upon the caprice and prejudice of jurors").

In addition to the magnified risk of an erroneous jury verdict where punitive damages are concerned, the relative harm suffered by the plaintiff and the defendant when error occurs must be considered. *See Santosky*, 455 U.S. at 765-66. This consideration is *overwhelming* where punitive damages are concerned. Since punitive damages in Mississippi are not intended to compensate the plaintiff for any loss, i.e., the plaintiff's actual damages fully compensate for the injuries sustained, punitive damages constitute a total windfall to the plaintiff. An erroneous failure to award punitive damages is, therefore, of no legitimate significance to the plaintiff.

> "[T]he plaintiff . . . has little or no legitimate personal interest in a correct result. As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff." Wheeler, *supra*, at 292; *see Yazoo*, 100 Miss. at 146.

In contrast, the defendant has very real and substantial interests at stake, i.e., the potentially enormous economic impact of an erroneous punitive award and the associated stigma. "If punitive damages are imposed improperly, or in an excessive amount, the defendant suffers far more than a plaintiff does if the jury incorrectly fails to impose them." Wheeler, *supra*, at 292. Accordingly, by no stretch of the imagination can it be said the risk of error should fall equally on the two. "To reflect this imbalance, the burden of proof should favor the defendant more than does the 'preponderance of evidence test.' " *Id.*, at 298.

The gross disparity in harm if there is an error was the consideration which led the Indiana Supreme Court to hold that entitlement to punitive damages must be proved by clear and convincing evidence. *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982).

It is no answer to the magnified risk of erroneous jury verdicts in punitive damage cases, and the gross disparity in harm if an erroneous verdict occurs, to say the erroneous verdict can be corrected by the trial judge or on appeal. "Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Santosky*, 455 U.S. at 757 (footnote omitted). "Nor has the Court treated appellate review as a curative for an inadequate burden of proof." *Id.*, at 757 n.9.

The *Eldridge* test also requires consideration of "the probable value, if any, of additional or substitute procedural safeguards." *Eldridge*, 424 U.S. at 335. "Raising the standard of proof would have both practical and symbolic consequences."[20] *Santosky*, 455 U.S. at 764. " 'Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' [awards will be rendered]." *Id.*, at 764-65; *see* Wheeler, *supra*, at 298.

3. The state has no substantial interest in continuing to allow the imposition of punitive damages under the preponderance of the evidence standard.

As this Court has put it, "[T]he States . . . have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 349. To the contrary, it is in the state's interest to bring punitive damages under control because "[p]revailing punitive damages procedures make overdeterrence likely." Wheeler, *supra*, at 307.

With seven-figure punitive awards against insurance companies being rendered by juries and affirmed by appellate courts, there has to be a substantial "shadow effect" at work, i.e., the potential for such huge awards impacts settlement of

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[20]Evidence is "clear and convincing" if it creates "an abiding conviction" that the truth of the factual contention is "highly probable." *Colorado v. New Mexico*, 467 U.S. at 316.

all insurance claims. But it is undesirable from a social utility perspective for insurers to become gun-shy in performing the legitimate, indeed essential task of screening and evaluating claims. To the extent insurers pay claims which should not have been paid, or pay more than should have been paid, in order to avoid the potential of punitive liability, the result, of course, is an increase in insurance premium rates. It is common knowledge it is rapidly becoming more and more difficult to find affordable liability insurance. Various tort reforms are being proposed to cope with the growing crisis by reducing insurers' costs. Obviously, runaway punitive damage awards against insurance carriers, to the extent they result in increased payment of nonmeritorious claims and overpayment of legitimate claims, are a step in the wrong direction. There is a very real public policy interest in seeing to it the pendulum does not swing too far against the insurance industry.

Under the *Eldridge* test, consideration of the state's interest also includes "the fiscal and administrative burdens that the . . . substitute procedural requirement would entail." *Eldridge*, 424 U.S. at 335. Changing the burden of proof in punitive damages cases would entail only nominal fiscal or administrative burdens for the state. The only burden is the cost of bifurcated trials in cases where punitive damages are sought. In part IV of this brief, *infra*, we discuss the need for bifurcation to avoid jury confusion over the differing standards of proof for compensatory and punitive damages. However, bifurcation poses no real burden. Wheeler, *supra*, at 321, 322 n.198.

In sum, all three *Eldridge* factors strongly point to the conclusion that to award punitive damages using the preponderance of the evidence standard is a violation of due process. Clear and convincing evidence should be required.[21]

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[21]In addition to the decisions of the Indiana and Wisconsin Supreme Courts mandating the clear and convincing standard in punitive damage cases, *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349; *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, the Maine Supreme Court recently did the same, *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1986) ("The potential consequences of a

IV.

DUE PROCESS REQUIRES A BIFURCATED TRIAL TO AVOID JURY CONFUSION AND PREJUDICE TO THE DEFENDANT.

Whether the higher burden of proof for punitive damages is "clear and convincing" or "beyond a reasonable doubt," either is very different from the preponderance of the evidence standard used to determine liability for compensatory damages. Professors Ghiardi and Kircher explain the problem this poses:

> "If the claims for compensatory and punitive damages are tried together the jury will be asked to weigh evidence that is being received simultaneously, by different standards. It is clear that such a situation will create confusion and uncertainty in the minds of the jury with the result that these different burdens of proof will be misapplied." 1 Ghiardi & Kircher, *supra,* § 12.04, at 12-13.

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punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence"). The Arizona Supreme Court has done so as well. *Linthicum v. Nationwide Ins. Co.,* 150 Ariz. 326, 723 P.2d 675, 680-81 (1986) ("When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole").

Several other states require clear and convincing evidence by statute. Alaska Stat. § 09.17.020 (Supp. 1986); Minn. Stat. Ann. § 549.20 (Supp. 1987); Mont. Code Ann. § 27-1-221(2) (1986); Or. Rev. Stat. Ann. § 30.925 (1983). Oklahoma requires clear and convincing evidence if punitive damages exceed the amount of actual damages awarded. Okla. Stat. Ann. tit. 23, § 9 (1987). Florida requires clear and convincing evidence if punitive damages exceed three times the amount of compensatory damages. Fla. Stat. Ann. § 768.73 (Supp. 1987). Colorado requires proof beyond a reasonable doubt. Colo. Rev. Stat. Ann. § 13-25-127(2) (Supp. 1986).

In February 1987 the American Bar Association House of Delegates adopted a recommendation that "the standard of proof to be applied [for punitive damages] should be 'clear and convincing' evidence as opposed to any lesser standard such as 'by a preponderance of the evidence.' " American Bar Association House of Delegates, Report of Action Taken at 1987 Midyear Meeting.

Accord Wheeler, *supra*, at 301. The solution is a bifurcated trial—separating plaintiff's punitive damages claim from the compensatory damages issues. Wheeler, *supra,* at 321; *accord* 1 Ghiardi & Kircher, *supra*, § 12.04, at 12-13.

A bifurcated trial where punitive damages are concerned is essential for another reason. There is a serious problem of prejudice to the defendant when the jury is allowed to hear evidence of wealth and malice, relevant only to punitive damages, before making its determination on liability for compensatory damages. Professor Wheeler decries "the fact that, before deciding the liability and compensatory damages issues, the jury hears evidence that is relevant only to the punitive damages issues and that may cause the jury to resolve other issues adversely to the defendant." Wheeler, *supra,*, at 285; *see id.*, at 291. Professors Ghiardi and Kircher concur. 1 Ghiardi & Kircher, *supra*, § 12.04, at 10.

The prejudicial impact of allowing evidence of defendant's wealth to go to the jury before liability for compensatory damages is determined was discussed by Professor Clarence Morris in an article written in 1931:

> "[I]t is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *supra,* at 1191 (emphasis added).

Today, it is readily apparent from the enormous punitive damage verdicts against corporate defendants (see Appendix A), verdicts which so frequently must be reduced by judges and appellate courts (see Appendix B), that juries probably are interested in divesting vested interests. There is every indication that evidence of wealth has turned out to be a source of injustice, as Professor Morris feared.

When the strong likelihood of jury confusion engendered by different proof standards for compensatory and punitive damages is added to the pre-existing problem of the prejudicial impact of evidence of wealth on the jury's determination of liability for compensatory damages, the case for bifurcation is compelling.[22]

V.

NO MEANINGFUL STANDARD GOVERNS THE AMOUNT OF A PUNITIVE PENALTY; ACCORDINGLY, THE PENALTY IS UNDULY VAGUE IN VIOLATION OF DUE PROCESS.

This Court has recognized that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz,* 418 U.S. at 350; *see* Wheeler, *supra,* at 285. This assessment certainly holds true in Mississippi.

Mississippi law provides no fixed standard by which jurors may compute the amount of a punitive award; instead, it merely "authorize[s] a quantum of punitive damages to be that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from

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[22]In February 1987 the American Bar Association House of Delegates adopted the following recommendation: "Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined." American Bar Association House of Delegates, Report of Action Taken at the 1987 Midyear Meeting, *supra.*

The Mississippi Supreme Court has strongly suggested that trial courts should exercise their discretion to bifurcate the punitive damage issue. *State Farm Fire and Cas. Co. v. Simpson,* 477 So.2d 242, 254 (Miss. 1985).

the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant." *Bankers Life & Cas. Co.*, 483 So.2d at 278. In accordance with this free-wheeling "standard," the jurors in this case were instructed that they "may take into account the financial status of the defendant" in computing a punitive award. [Record on appeal at 1130-31 (Instruction No. P-19A).] This is *all* the jurors were told on this subject.

A forthright analysis of the Mississippi "standard" leads inexorably to the conclusion it is unconstitutionally vague. The "void for vagueness" doctrine requires government to:

> "articulate its aims with a reasonable degree of clarity [to] ensure[ ] that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduc[ing] the danger of caprice and discrimination in the administration of the laws, enabl[ing] individuals to conform their conduct to the requirements of law, and permit[ting] meaningful judicial review." *Roberts v. United States Jaycees*, 486 U.S. 609, 629 (1984).

The vagueness doctrine has application to standards for determining a penalty as well as for determining liability. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). And the doctrine applies to civil as well as criminal statutes. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966.)[23]

Prevention of arbitrary and discriminatory enforcement is recognized to be "the more important aspect of the vagueness

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[23]As explained in part II, *supra*, punitive damages in purpose and effect are a criminal penalty. "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983). Even if punitive damages properly could be considered a remedial civil sanction (they cannot), the present reality of enormous awards— far in excess of any fine which can be levied under existing criminal laws—means there is no room to tolerate vagueness. The consequences of imprecision frequently are draconian.

doctrine." *Kolender,* 461 U.S. at 358. A statement of this aspect of the doctrine is in *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1979):

> "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Footnotes omitted.)

This Court already has recognized that punitive damages are susceptible to arbitrary and discriminatory application. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *Electrical Workers,* 442 U.S. at 50 n.14. The "unpopular defendants" in this context are usually those with wealth, primarily corporations, frequently insurance companies. The need for specific standards to guide jury discretion in order to prevent punitive awards which are arbitrary and discriminatory in amount is apparent.

Yet Mississippi allows jurors essentially unbridled discretion in fixing the amount of a punitive award. The defendant's financial worth is the only objective consideration. But, while evidence of wealth may provide some guidance in setting an amount sufficient to deter when the defendant is an individual of normal means or a small business, it is less and less meaningful as wealth increases, to the point of providing no guidance whatsoever when a multi-million or multi-billion dollar corporation is involved. Consider the following hypothetical: Suppose an individual with net worth of $10,000, a company with net worth of $100 million, and a company with net worth of $1 billion engage in identical tortious conduct causing identical injuries to plaintiff. The jury determines that the imposition of $1,000 in punitive damages against the individual defendant (ten percent of net worth) is sufficient punishment to have the prescribed deterrent effect. On its face, this appears to be reasonable. But does this mean the jury should impose punitive damages of $10 million against the

first company (ten percent of its net worth, but 10,000 times more than the fine imposed on the individual), and $100 million against the second company (ten percent of its net worth, but 100,000 times more than the fine imposed on the individual) in order to achieve the same deterrent effect? Certainly not.[24] But the jury is not told how the corporate defendants should be treated differently from the individual defendant. The same, imprecise "financial worth of the defendant" factor is used in every case. The particular vagueness of this factor where corporations are concerned means it is of little or no use where it is needed the most.

The availability of review of a jury's punitive damage verdict for excessiveness does not remedy the unconstitutional vagueness of the "standard" the jury uses. Case-by-case judicial review for excessiveness is no substitute for a precise standard in the first instance. *See Santosky*, 455 U.S. at 757; Wheeler, *supra*, at 288. This is particularly true in Mississippi, where the Supreme Court is extremely deferential to a jury's determination of the amount of a punitive award, *e.g., Gardner v. Jones*, 464 So.2d 1144, 1150 n.5 (Miss. 1985) ("we have expressed a great reluctance to interfere with the amount of a punitive damages assessment made by a jury"), and it reviews awards to see if they are excessive under the same, vague "financial worth of the defendant" standard given to the jury, *e.g., Bankers Life & Cas. Co.*, 483 So.2d at 279 ("However high that amount [$1.6 million] may 'seem,' it may not . . . be said to shock the judicial conscience" because it is less than one percent of the defendant's net worth). In any event, reliance on case-by-case review by an appellate court is simply unfair. It means the defendant necessarily must incur the expense of prosecuting an appeal.[25]

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[24]Yet this is exactly how plaintiffs' counsel usually argue the case to the jury.

[25]In Mississippi, the 15 percent penalty imposed by law on a losing appellant discourages even seeking appellate review. Miss. Code Ann. § 11-3-23 (Supp. 1986).

At bottom, one is hard pressed to devise a penalty more vague and destructive than is permitted by most states' punitive damage laws. There is no essential difference between these laws and a criminal fine without an upper limit. We are confident this Court would not countenance a law imposing a limitless fine. Neither should it countenance these limitless punitive damage laws under which juries have rendered such incredible verdicts.

CONCLUSION

Amici respectfully request that this Court examine and reassess punitive damages in light of the constitutional principles we have discussed. Based on these principles, we submit the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,
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APPENDIX

1976

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 5,300,000	Austero v. Washington National Insurance Co.	20/30/38
935,000	Eichar v. Surety Life Insurance Co.	20/15/35
511,138	Runnels v. Astra Pharmaceut	20/32/12
379,000	Fleckner-Palmtag Realty v. Kaufman	21/3/9
175,000	Townhouse Gardens v. Reliance Capital Corp.	20/19/32
125,000	U.S. Cablevision v. Microwave Engineering, Inc.	20/14/21
100,000	Richardson v. Handy Pantry Food Stores	20/47/18

1977

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11
336,000	Austero v. National Casualty of Detroit	21/10/38
275,000	Sinclair v. Flo-Kem Products	21/31/19
250,000	Anderson v. Weisman	21/15/15
250,000	Lemer v. Boise Cascade	21/19/1
220,000	Ginsburg v. Ginsburg	21/39/6
175,000	Parks v. Marine Office of America	21/21/37
150,000	Miller v. Elite Insurance Co.	21/16/6

1978

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000,000	Grimshaw v. Ford Motor Co.	22/14/26
4,000,000	Hasson v. Ford Motor Co.	22/45/23
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18
1,500,000	Mardor v. Richards Manufacturing Co.	22/29/19
1,075,000	Jones v. Bank of America	22/52/4
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14
663,000	Veterinary Pathology v. Revlon, Inc.	22/43/24
500,000	Davis v. Environmental Power Ltd.	22/31/22
500,000	Dickinson v. Vorelco of Cal., Inc.	22/24/4
500,000	J. Blazona Constr., Inc. v. Evert	22/48/6
250,000	Stranlund v. Safeco Title Insurance Co.	22/46/21
165,000	Davis v. Blue Cross of Northern California, Inc.	22/42/3
150,000	Chevalier v. Dubin	22/26/20
140,000	Aikey v. Vletas	22/16/20

1979

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 17,750,003	Harmsen v. Smith	24/5/23
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29
1,310,000	Helderman v. Int'l Brotherh'd of Elec. Wrkrs.	23/17/3
1,000,000	MPB Associates v. United California Bank	23/46/6
900,000	Parnell v. Continental Casualty Co.	23/40/7
872,001	Ingram v. Commercial Bankers	23/32/22
350,000	Smith v. La Vista Cemetery Assn.	24/5/22
315,000	Gilmore v. International Finance and Trade Development Corp.	23/36/27
150,000	Alhino v. Western Title Guaranty Co.	23/8/1
110,000	Fitzgerald v. Advanced Health Systems, Inc.	23/38/28
100,000	Laurens v. Republic Nat'l Life Insurance Co.	23/39/17

1980

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22
4,500,000	Norman v. Colonial Penn Franklin Life Ins. Co.	24/52/19
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18
2,200,000	C.C. Davis & Co. v. Alioto	24/28/2
1,500,000	Wayte v. Rollins International, Inc.	25/8/12
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13
1,000,000	Glover v. Allstate Insurance Co.	25/2/19
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3
750,000	Noronha v. Blue Cross of No. California	24/20/6
560,000	Rosen v. Sneed	24/48/16
525,000	Diaz v. Tribune Publishing Co.	24/8/3
400,000	Cohen v. Fitzsimmons	24/17/4
350,500	Jones v. Allstate Insurance Co.	24/26/40
346,000	Ambrose v. Scott	24/48/3
300,000	Oberg v. A-S Development, Inc.	24/30/12
275,000	Price v. Cavanaugh	25/3/17

1980 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 250,000	M.V. Golden Pacific v. San Diego Marine Constr.	24/12/25
200,000	Austero v. Washington National Insurance Co.	24/21/24
200,000	Chodos v. Insurance Co. of North America	24/26/30

1981

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 3,117,946	Spieker v. Senator Hotel Associates	26/5/8
3,000,000	Betts v. Allstate Insurance Co.	25/48/17
2,500,000	Moore v. American United Life Insurance Co.	26/15/13
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4
2,000,000	Aceto v. Certified Life Insurance Co. of Cal.	25/27/10
2,000,000	California Shoppers, Inc. v. Royal Globe Insurance	
2,000,000	Smithers v. Metro-Goldwyn-Mayer, Inc.	25/46/24
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8
1,500,000	Marino v. Synanon Church	25/43/7
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23
750,000	McKibben v. Connecticut Indemnity Co.	26/9/9
750,000	Ziglar v. Noble	25/52/19
700,000	Roland v. Al Sabah	25/48/2
584,045	Baker v. Kemper Insurance Co.	25/10/34
558,160	Paulfrey v. Blue Chip Stamps Co.	25/46/31
500,000	Bananejad v. Habish Int'l, Inc.	25/48/5

1981 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg
$500,000	Mosby v. Duffin	25/28/6
260,000	Palmer v. Smith's Food King Market	26/5/16
250,000	Hapip v. Texas Renaissance Festival, Inc.	25/26/5
200,000	Ray v. Bank of America	26/5/4
200,000	Rulon-Miller v. IBM Corp.	26/11/1
200,000	Schlager v. Homel	25/29/19
200,000	Songer v. Bordan	25/39/3
166,000	Kennedy v. Pier 1 Imports	26/2/6
150,000	Insurors of California v. DeMarco, Barger, Beral & Pierno	25/21/17
116,000	Fleming v. Safeco Insurance Co. of America	26/5/19
100,000	Badagliacia v. Millennium	25/24/12
100,000	Waite v. Wasserman	25/38/7
100,000	Young v. Personal Service Insurance Co.	25/30/16

1982

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27
2,500,000	Pollard v. National Life & Accident Co.	26/50/26
2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5
1,500,000	Travelers Insurance Co. v. Lesher	26/36/2
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21
1,000,000	Thomsen v. Volkswagen of America	26/50/1
750,000	Gonzales v. Underwriters at Lloyds, London	26/37/12

1982 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 606,096	Supreme Industries, Inc. v. Centurion Boats, Inc.	26/33/18
600,000	Lloyd v. Fila Sports, Inc.	26/51/4
600,000	Moss v. Equitable Life Assurance Society	26/43/11
600,000	Shannon v. Jackes-Evans Manufacturing Co.	27/9/10
500,000	Scholtz v. Shearson, Hayden, Stone, Inc.	27/1/3
500,000	Woodland Production Credit Assn. v. Nicholas	26/49/15
445,000	Geller v. 227 East Anapamu St., Ltd.	27/8/37
350,000	Pellegrini v. Aycock	26/39/5
350,000	Stepp v. Great Western Savings & Loan Assn.	26/48/6
250,000	Smith v. Hollywood Collateral Loan Assn.	26/53/4
125,000	Cook v. Sears, Roebuck and Co.	27/14/37
100,000	Granich v. Shapray	27/7/20
100,000	Hill v. National Auto & Casualty Insurance Co.	27/2/22
100,000	Kennedy v. Building Services Local 87	26/20/1
100,000	Lederman v. Pacific Mutual	27/2/28
100,000	Meyer v. Byron Jackson, Inc.	26/39/29
100,000	Newman v. Roston	26/50/39
100,000	Rhea v. RCA Corp.	26/28/18

1983

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 40,025,000	Fellows v. Allstate Insurance Co.	28/23/19
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25
8,000,000	Frazier v. Metropolitan Life Insurance Co.	27/24/21
5,000,000	Sprague v. Equifax, Inc.	27/17/31
2,681,000	Clark v. Wits, Inc.	27/48/16
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9
1,800,000	Pitts v. Fibreboard Corp.	28/8/1
1,500,000	Young v. Great Western United, Inc.	27/42/26
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8
1,000,000	Lembo v. Nardoni	28/26/20
900,000	Mancini v. Royal Indemnity Co.	27/21/1
750,000	Glass v. Philip Roxanne, Inc.	28/26/12
750,000	Ladd v. Superfilm, Ltd.	28/26/24

1983 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 500,000	Four 425 Shatto Bldg. Co. v. Air Conditioning Co., Inc.	27/35/20
500,000	Nakahara v. Ace American, Inc.	27/30/7
480,000	Baysinger v. Pacific Mutual Life Insurance Co.	28/19/17
400,000	Sullivan v. Kaiser Foundation Health Plan, Inc.	28/17/25
360,000	Wilson v. Meyer	28/19/34
339,525	Kan v. American District Telegraph Co.	27/42/2
300,000	Adams v. Esparza	27/49/5
250,000	Collins v. Berner	28/15/7
240,000	Robinson v. Firestone Tire & Rubber Co.	27/33/21
225,000	Dime's Group v. Travenol Laboratories, Inc.	28/12/10
220,000	Hobbs v. Bateman, Eichler, Hill Richards	27/24/24
200,000	Bravo v. The Clubhouse	27/44/25
200,000	Shirkhani v. Starcrest Products of California	27/40/14
200,000	Wright v. Randles	27/32/6
150,000	Frankenberger v. Int'l Real Estate Network	28/26/22
150,000	Mammoth Vista Owners Assn. v. General Ins. Co.	27/51/15
150,000	Silverado Title Co. v. Sorensen	28/13/15
139,000	Kelly v. General Telephone Co.	28/25/20

1983 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000	Northrup v. Fink	28/14/7
125,000	Schroeder v. Safeco Insurance Co.	28/7/12
100,000	Americana Air Cargo v. Sendrex Cargo	28/6/23
100,000	Calloway v. Travelers Insurance Co.	27/29/13
100,000	Schwab v. Smith	28/6/14

1984

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24
4,000,000	Royster v. Mission Insurance Co.	28/35/11
3,500,000	Mattie v. Picker Corp.	28/37/9
3,000,000	Litwak v. Fed Mart Corp.	28/44/71
2,660,000	Seeley v. Seymour	28/20/7
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25
2,000,000	Taylor v. State Farm Fire & Casualty Ins. Co.	28/39/22
2,000,000	Tushinsky v. Tushinsky	28/51/21
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16
1,500,000	Davis v. Continental Insurance Co.	28/39/13
1,500,000	Stern v. Dow Corning Corp.	29/17/18
1,500,000	Umann v. Mor-Ben Insurance Markets Corp.	29/16/3
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29
1,000,000	McNair v. Worldwide Church of God	29/8/22
750,000	Darblay v. Western Medical Enterprises, Inc.	29/3/10
732,083	Spangler v. Great Southwest Fire Insurance Co.	29/20/31
680,000	Dunkley v. Vermeer Mfg. Co.	28/38/1
650,000	Doe v. Elashi	29/18/37
525,000	Fisher v. 20th Century Insurance Co.	28/49/51
500,000	Ackerman v. K-Mart Discount Stores, Inc.	29/4/24
500,000	Foreman v. United Insurance Co. of America	29/9/11
500,000	Total Experience Records, Inc. v. Lang	29/5/18
442,500	Greenfield v. Spectrum Investment Corp.	28/30/25
400,000	Coastside Publishers and Printers v. Half Moon Bay Review, Inc.	28/16/2
400,000	Jones v. Montgomery Ward	28/34/20
370,000	Weaver v. Grodins of California, Inc.	28/45/5
300,000	Shook v. International Dairy Queen, Inc.	29/16/21
294,000	Comfort v. Farasat	29/14/11

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 292,210	Barbara Colton Interiors v. Joesoef	28/50/11
288,750	Waite v. Smith, Klieman & St. Francis Hosp.	29/16/31
276,000	Smith v. J.C. Penney, Inc.	29/18/21
250,000	Hanes v. Davis	28/21/13
244,000	San Jose Cash Register v. Tokyo Electronics Corp.	29/15/8
200,000	Kauric v. Hodgson	28/49/67
200,000	Velzy Engineering & Machine, Inc. v. Western Industrial Corp.	28/51/21
200,000	Vitali v. Bartell	28/34/22
200,000	Wells v. Raymark Industries, Inc.	29/9/6
189,272	United Western Insurance Marketing v. Olken	28/33/16
175,000	Boozer v. All-West Design, Inc.	28/15/12
175,000	Gigliotti v. Collins	28/41/11
175,000	Knott v. Boutin	28/47/11
175,000	Putz v. Industrial Indemnity Co.	29/11/15
160,000	Pusateri v. E.F. Hutton & Co., Inc.	28/48/11
150,000	Agarwal v. Bechtel Corp.	28/19/10
150,000	Smyth v. Herschensohn	29/7/25
140,000	Adams v. California Land Title Co.	28/31/18
134,000	Godfrey v. West Coast Folk Clubs, Inc.	29/20/32

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000	Greenup v. Bankers United Life Assurance Co.	28/44/29
125,000	Sanders v. Airport Park Hotel	28/38/32
125,000	Stewart v. Cal-Farm Insurance Co.	29/7/19
120,000	Allan v. Cal-Farm Insurance Co.	28/33/13
114,000	Nelson v. Arcuri	28/40/9
112,500	Welch v. Marx	28/49/61
102,000	Friedman v. Spataro	29/8/5
100,002	Tassey v. Madera Warehouse Co., Inc.	28/33/11
100,000	Abel v. Abel	28/23/29
100,000	Basque French Bakery v. Toscana Baking Co.	28/39/14
100,000	Coleman & Christianson, Inc. v. Gold Depository and Loan Co.	28/23/2
100,000	Davies v. Parker	28/36/2
100,000	Frazier v. City of Alameda	28/30/1
100,000	Multiplex Insurance Agency, Inc. v. California Life Insurance Co.	29/7/1
100,000	Oranje v. Bank of America	28/22/14
100,000	Wilson v. Midland National Life Insurance Co.	28/29/22
100,000	Wright v. Echandi	28/17/18

1985

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000,000	Micro/Vest v. Computerland	29/40/1
46,500,000	Haun v. NEC Electronics	29/28/12
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23
26,675,000	Kruse v. Bank of America	29/48/11
20,000,000	Rice Growers Assn v. Trans-america Delaval, Inc.	29/25/7
10,000,000	McCullough v. S & H Insurance Co.	29/20/21
10,000,000	Stanton v. Continental Casualty Co.	30/8/18
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13
7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25
6,243,750	Bryn Mar v. Browne	30/16/32
5,002,500	Eastridge v. Shell Oil Co.	29/19/38
3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/45/18
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27
2,127,500	Crake v. Martin	30/14/36
2,120,000	Young v. Knudsen Corp.	29/18/32
2,002,500	Kreisher v. Mobil Oil	30/29/3
2,000,000	Garrett v. Montgomery Ward Co.	30/2/8
2,000,000	Lisec v. United Airlines	30/26/15
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13
1,085,000	Orsatti v. Farmer	29/46/20
1,060,000	Feldman v. Fox and Carskadon	29/38/9
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71
921,000	Cohen v. ViaCom Enterprises, Inc.	30/11/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 800,000	Backus v. Foremost Insurance Co.	30/7/25
800,000	Stegeman v. Sears, Roebuck and Co.	29/50/1
750,000	Carpet Svc. Systems v. Canadian Indemnity Co.	29/35/23
750,000	Sarno v. Sentry Insurance Co.	29/40/15
700,000	Hughes v. Blue Cross of California	29/27/6
662,500	Cistaro v. GC Services Corp.	29/29/19
500,000	Chapman v. Tera Pharmaceuticals, Inc.	30/3/23
500,000	Pierovich v. Equitable Life Assurance Society	29/47/24
500,000	Russell v. Sentry Indemnity Co.	30/4/20
500,000	Simon v. Eureka Financial Corp.	30/5/6
500,000	Watkins v. Arklin	30/39/27
500,000	Thompson v. Boys Market	30/39/27
400,000	Hess v. Air France	29/23/30
400,000	Kramer, Wilson, Sauvegeau, Inv. v. Sauvegeau	29/38/26
400,000	Morales v. Insurance Co. of No. America	30/8/11
400,000	Thomas v. Aubrey	29/48/23
300,000	Foor v. Reliance Insurance Co.	29/35/20
300,000	Ross-Leming v. Continental Insurance Co.	29/33/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 250,000	Ruby v. Industrial Indemnity Co.	29/21/29
241,058	Manhattan Life Insurance Co. v. Eldridge	29/24/22
200,297	Ringham v. A.T. Kearney, Inc.	29/48/15
200,000	Green v. Standard Brands Paint Co.	30/5/24
200,000	Nethery v. Unterthiner	29/42/29
200,000	Stephens v. Coldwell Banker	30/1/6
180,000	Kee v. Farmers Insurance Exchange	29/30/3
176,000	Hooper v. Fort Howard Paper Co.	29/34/19
175,000	Ambrose v. U.S. Steel Corp.	29/46/13
160,000	Moore v. Peterson	29/51/15
150,000	B & H Manu. Co. v. Williamson	30/35/13
150,000	Palmer v. Ted Stevens Honda, Inc.	29/51/7
135,000	Avila v. Commercial Union Insurance Co.	30/9/25
125,000	Wallis v. Beverly Fabrics	30/22/3
118,500	Winograd v. Mangel	29/22/28
100,000	Aston v. Yamaha Motor Corp.	29/41/16
100,000	Brown v. Sierra Pacific Power Co.	29/36/31
100,000	Gorospe v. Rosselli	29/21/6
100,000	Jacques Interiors v. Petrak	29/27/24

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 100,000	Martin v. Farmers Insurance Group	29/34/2
100,000	Martin v. Sunrise Memorial Cemetary	29/26/1
100,000	Ochoa v. Financial Indemnity Co.	29/31/23
100,000	Schletewitz v. Industrial Indemnity Co.	29/36/15
100,000	Ganci v. Air Cal	30/17/31
100,000	Para v. Watsonville Canning Co.	30/17/7

1976

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$5,300,000	Austero v. Washington National Insurance Co.	20/30/38	Remitted to $250,000	Ira Rivin Attorney for Defendant

1977

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2	Denied[1]	110 Cal.App.3d 740, 752
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11	Granted	Christina Snyder Attorney for Plaintiff

[1]Court of Appeal remitted to $2.5 million. 110 Cal.App.3d 740, 757.

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1978

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$125,000,000	Grimshaw v. Ford Motor Co.	22/14/26	Remitted to $3.5 million	119 Cal.App.3d 757, 772
4,000,000	Hasson v. Ford Motor Co.	22/45/23	Denied	32 Cal.3d 388, 398
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18	Denied	John Gilmore Attorney for Defendant
1,500,000	Marmer v. Richards Manufacturing Co.	22/29/19	Denied	Arthur Schwimmer Attorney for Plaintiff
1,075,000	Jones v. Bank of America	22/52/4	Granted	George Duff Attorney for Defendant

1978 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14	Remitted to $500,000	James Waldorf Attorney for Defendant

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$17,750,003	Harmsen v. Smith	24/5/23	Denied	Jury Verdicts Weekly
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1	Remitted to $7 million	36 Cal.3d 752, 762
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29	Denied	Ellis J. Horvitz Attorney for Defendant
1,310,000	Helderman v. Int'l Brotherh'd of Elec. Wrkrs.	23/17/3	Denied	Alan C. Davis Attorney for Defendant
1,000,000	MPB Associates v. United California Bank	23/46/6	Remitted to $0	Robert Lofts Attorney for Defendant

1980

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27	Remitted to $1 million	Maynard Brown Attorney for Defendant
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22	Denied	Jerold V. Goldstein Attorney for Defendant
4,500,000	Norman v. Colonial Penn Franklin Life Insurance Co.	24/52/19	Denied	John Hager Attorney for Defendant
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18	Remitted to $200,000	Jury Verdicts Weekly

2,200,000	C.C. Davis & Co. v. Alioto	24/28/2	Remitted to $264,000	James Penrod Attorney for Plaintiff
1,500,000	Wayte v. Rollins International, Inc.	25/8/12	Remitted to $408,000[2]	169 Cal.App.3d 1, 9
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13	Remitted to $350,000	Ellis J. Horvitz Attorney for Plaintiff
1,000,000	Glover v. Allstate Insurance Co.	25/2/19	Denied	Donald Ruston Attorney for Defendant
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3	Denied	123 Cal.App.3d 541, 544 n.2

[2]Court of Appeal reinstated $50,000. 169 Cal.App.3d 1, 16.

1981

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$3,117,946	Spieker v. Senator Hotel Associates	26/5/8	Denied	Theodore Marois Attorney for Defendant
3,000,000	Betts v. Allstate Insurance Co.	25/48/17	Denied	154 Cal.App.3d 688, 697
2,500,000	Moore v. American United Life Insurance Co.	26/15/13	Denied	150 Cal.App.3d 610, 642
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4	Denied	William Irvin Attorney for Defendant
2,000,000	Aceto v. Certified Life Insurance Co. of Cal.	25/27/10	Remitted to $1 million	Jury Verdicts Weekly

2,000,000	California Shoppers, Inc. v. Royal Globe Insurance Co.	25/38/15	Denied; JNOV granted	175 Cal.App.3d 1, 13
2,000,000	Smithers v. Metro-Goldwyn-Mayer, Inc.	25/46/24	Remitted to $1 million	Jury Verdicts Weekly
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8	Denied	Jury Verdicts Weekly
1,500,000	Marino v. Synanon Church	25/43/7	Remitted to $1 million	Daniel Crawford Attorney for Defendant
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23	Remitted to $750,000	144 Cal.App.3d 991, 997

1982

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23	Granted	Jury Verdicts Weekly (27/52/21)
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8	Remitted to $1 million	174 Cal.App.3d 831, 840
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30	Granted	Jury Verdicts Weekly
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27	Denied	J. Randall Faith Attorney for Defendant
2,500,000	Pollard v. National Life & Accident Co.	26/50/26	Denied	Jury Verdicts Weekly

2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4	Denied	Steve Tausz Attorney for Defendant
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5	Remitted to $1.2 million	Jury Verdicts Weekly
1,500,000	Travelers Insurance Co. v. Lesher	26/36/2	No motion filed	Jury Verdicts Weekly
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12	Denied	Thomas Hartwell Attorney for Defendant
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8	Denied	Jury Verdicts Weekly
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3	Denied	Jury Verdicts Weekly
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21	Denied	Hillel Chodos Attorney for Plaintiff
1,000,000	Thomsen v. Volkswagen of America	26/50/1	Denied	James Crawford Attorney for Plaintiff

1983

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$40,025,000	Fellows v. Allstate Insurance Co.	28/23/19	Granted	Judith Gold Attorney for Defendant
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21	Denied	Jury Verdicts Weekly
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16	Denied	Jury Verdicts Weekly
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25	Remitted to $2 million	Ellis J. Horvitz Attorney for Plaintiff

8,000,000	Frazier v. Metropolitan Life Insurance C[illegible].	27/24/21	Remitted to $2 million	169 Cal.App.3d 90, 94
5,000,000	Sprague v. Equifax, Inc.	27/17/31	Remitted to $1 million	166 Cal.App.3d 1012
2,681,000	Clark v. Wits, Inc.	27/48/16	Denied	Scott Spolin Attorney for Defendant
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3	Denied	Peter Bersin Attorney for Defendant
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9	Denied	Burton McGovern Attorney for Defendant
1,800,000	Pitts v. Fibreboard Corp.	28/8/1	Denied	Jury Verdicts Weekly
1,500,000	Young v. Great Western United, Inc.	27/42/26	Denied	Jury Verdicts Weekly
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8	Denied	Jonathan Erb Attorney for Defendant
1,000,000	Lembo v. Nardoni	28/26/20	Denied	Tony Hemming Attorney for Defendant

1984

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18	Denied	Jury Verdicts Weekly
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16	Denied	189 Cal.App.3d 1072, 1099
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13	Remitted to $1 million	Russell Reiner Attorney for Plaintiff
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24	Denied	Jury Verdicts Weekly
4,000,000	Royster v. Mission Insurance Co.	28/35/11	Denied	David Simon Attorney for Defendant

3,500,000	Mattie v. Picker Corp.	28/37/9	Denied	Jury Verdicts Weekly
3,000,000	Litwak v. Fed Mart Corp.	28/44/71	Denied	Jury Verdicts Weekly
2,660,000	Seeley v. Seymour	28/20/7	Denied	John Dickson Attorney for Defendant
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25	Remitted to $250,000	Jury Verdicts Weekly
2,000,000	Taylor v. State Farm Fire & Casualty Insurance Co.	28/39/22	Denied	Jury Verdicts Weekly
2,000,000	Tushinsky v. Tushinsky	28/51/21	Denied	Jury Verdicts Weekly
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16	Denied	Geoffrey Bourroughs Attorney for Defendant
1,500,000	Davis v. Continental Insurance Co.	28/39/13	Denied	Jury Verdicts Weekly
1,500,000	Stern v. Dow Corning Corp.	29/17/18	Denied	Sonja Blomquist Attorney for Defendant
1,500,000	Umann v. Mor-Ben Insurance Markets Corp.	29/16/3	Remitted to $750,000	Jury Verdicts Weekly

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12	Remitted to $161,000	Jury Verdicts Weekly
1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29	Settled prior to new trial hearing	Ryan Knapp Attorney for Defendant
1,000,000	McNair v. Worldwide Church of God	29/8/22	Denied	Jury Verdicts Weekly

1985

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$125,000,000	Micro/Vest v. Computerland	29/40/1	Denied	Jury Verdicts Weekly
46,500,000	Haun v. NEC Electronics	29/28/12	Granted	Jury Verdicts Weekly
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23	Remitted to $500,000	Joseph Ryan Attorney for Defendant
26,675,000	Kruse v. Bank of America	29/48/11	Remitted to $6 million	Jury Verdicts Weekly
20,000,000	Rice Growers Assn. v. Transamerica Delaval, Inc.	29/25/7	Remitted to $1 million	Ellis J. Horvitz Attorney for Defendant

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
10,000,000	McCullough v. S & H Insurance Co.	29/20/21	Remitted to $6 million	Claire Johnson Attorney for Defendant
10,000,000	Stanton v. Continental Casualty Co.	30/17/19	Remitted to $5 million	Jury Verdicts Weekly
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21	Denied	David Zwieg Attorney for Defendant
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13	Remitted to $932,550	Jury Verdicts Weekly

7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25	Remitted to $2 million	Ellis J. Horvitz Attorney for Defendant
6,243,750	Bryn Mar v. Browne	30/16/32	Remitted to $4,242,995	Ellis J. Horvitz Attorney for Defendant
5,002,500	Eastridge v. Shell Oil Co.	29/19/38	Denied	Harris Steinberg Attorney for Plaintiff
$3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28	Denied	Jury Verdicts Weekly
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21	Remitted to $2.26 million	Ellis J. Horvitz Attorney for Defendant
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20	Remitted to $1 million	Jury Verdicts Weekly
2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/37/20	Settled prior to new trial hearing	Peter Gelblum Attorney for Defendant
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5	Remitted to $350,000	Jury Verdicts Weekly

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10	Denied	Jury Verdicts Weekly
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9	Denied	Ardell Johnson Attorney for Defendant
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27	Denied	Gordon Opel Attorney for Defendant
2,127,500	Crake v. Martin	30/14/36	Settled prior to new trial hearing	Michael Portigal Attorney for Defendant
2,120,000	Young v. Knudsen Corp.	29/18/32	Settled prior to new trial hearing	Benjamin Williams Attorney for Defendant
2,002,500	Kreisher v. Mobil Oil	30/29/3	Denied	William O'Brien Attorney for Defendant

2,000,000	Garrett v. Montgomery Ward Co.	30/2/8	Denied	Zachary Smith Attorney for Defendant
2,000,000	Lisec v. United Airlines	30/26/15	Denied	Jury Verdicts Weekly
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32	Remitted to $200,000	Craig Jorgenson Attorney for Defendant
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7	Denied	Jury Verdicts Weekly
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29	Remitted to $1.1 million	Morton Caplan Attorney for Defendant
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13	Denied	Jury Verdicts Weekly
1,085,000	Orsatti v. Farmer	29/46/20	Remitted to $0	Robert Wilson Attorney for Defendant
1,060,000	Feldman v. Fox and Carskadon	29/38/9	Remitted to $250,000	Jury Verdicts Weekly
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71	Remitted to $151,000	Jury Verdicts Weekly

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 29, 1987, I served the within *Motion for Leave to File Brief and Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 29, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)